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Supreme Court, U.S.
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No. 01-

In The
SUPREME COURT OF THE UNITED STATES

LORI A. SAFRIT,
Petitioner,
v.
CONE MILLS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a collective bargaining agreement which forbids violations of Title VII of the 1964 Civil Rights Act and states that violations of that provision of the agreement are subjects for arbitration create a legally enforceable bar to private civil actions under Title VII by employees covered by the agreement?

PARTIES

The parties to this proceeding are set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lori A. Safrit respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on April 27, 2001.

OPINIONS BELOW

The April 27, 2001 opinion of the Court of Appeals, which is reported at 248 F. 3d 306 (4th Cir. 2001), is set out at pp. 1a - 5a of the Appendix to this petition. The November 9, 1999 memorandum opinion of the district court, which is reported at 1999 WL 1111516, is set out at pp. 6a – 11a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 27, 2001. On July 9, 2001, the Chief Justice granted an extension of time for the filing of the petition until August 27, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

STATUTES INVOLVED

Section 706(f) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-5(f), provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency,

> or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

At the time when this litigation arose petitioner was employed at Cone Mills' plant in Salisbury, North Carolina. She was also a member of the United Needletrades, Industrial and Textile Employees Union, which represented workers at that plant.

In 1994 petitioner became a fixer trainee. She was the only female employee in that group of trainees. She alleged that Cone Mills failed to provide her with proper training and denied her job opportunities that were afforded to male trainees. She contended that Cone Mills had engaged in this discriminatory action because petitioner was a woman.

The collective bargaining agreement (CBA) in effect at the plant specifically forbade both the company and the union to discriminate on the basis of sex, and the company and union further agreed to comply with "all the requirements of Title VII of the Civil Rights Act of 1964." The collective bargaining agreement established a four step grievance process, and stated that "[un]resolved grievances . . . are the proper subjects for

arbitration."[1] Under the CBA neither Safrit nor any other individual employee had a right to pursue a grievance or seek arbitration; only the union itself was authorized to do so.

Petitioner initially took her sex discrimination claim to the union, which filed a grievance. The matter proceeded through the fourth step of the grievance process, at which point the company agreed to provide petitioner with additional time to train as a fixer. Petitioner accepted that offer. Despite that agreement, however, the discrimination resumed, and petitioner did not continue in the fixer program.

Petitioner again complained to the union, but the union declined to file a grievance about these new discriminatory practices. Instead, the union advised petitioner that if she wanted to stop the alleged discrimination she should retain an attorney and file suit under Title VII. Because the union chose to not even file a first step grievance, the possibility that the union would seek arbitration never arose.

Petitioner commenced this action in 1997 in the United States District Court for the Middle District of North Carolina. The company moved to dismiss, insisting that the remedies provided by the collective bargaining agreement were the sole method of enforcing Title VII, and that the agreement

---

[1]The full text of Section XX of the agreement was as follows:

> "The Company and the Union agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability. this includes, but is not limited to, all phases of employment, benefits, hiring, placement, rates of pay, upgrading, layoff, demotion, and termination. The parties further agreed that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964 and Executive Orders 11246 and 11375.
>
> Arbitration. Unresolved grievances arising under this Section are the proper subject for arbitration."

negotiated by the union had waived prospectively the rights of union members to seek judicial enforcement of Title VII. Controlling Fourth Circuit precedent held that a collective bargaining agreement could waive an employee's right to seek judicial relief. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875 (4th Cir. 1996). While the motion was pending, certiorari had been granted in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), to decide resolve a conflict between *Austin* and decisions to the contrary in several other circuits. The district court in the instant case therefore stayed proceedings in the litigation pending this Court's decision in *Wright*.

This Court's 1998 decision in *Wright*, however, did not resolve whether a collective bargaining agreement requiring arbitration of discrimination claims would be legally enforceable against an individual employee. Rather, *Wright* concluded that any CBA requirement to arbitrate "must be particularly clear", 525 U.S. at 79, and that the CBA in that case lacked the requisite clarity. 525 U.S. at 80-82.

In the wake of this Court's decision in *Wright*, the district court held that the collective bargaining agreement in this case "clearly and unmistakably provides that any claim of gender discrimination is subject to arbitration." (App. 9a). The district court upheld the enforceability of that asserted waiver, relying on post-*Wright* Fourth Circuit decisions reasserting that circuit's adherence to *Austin*. (App. 8a). In this case the decision not to file a grievance, let alone seek arbitration, had been made by the union; the district court held that in such a situation an employee might have a claim against the union, but only if she could show that the union itself acted with a discriminatory motive. (App. 10a).

The Fourth Circuit affirmed. Relying on *Austin* and its Fourth Circuit progeny, the court of appeals held that a union could bargain away an employee's right to judicial enforcement

of Title VII, could agree with the employer that only the union--and not the individual worker--could invoke the substitute remedies provided by the collective bargaining agreement, and could then decline to pursue those remedies even though a worker alleged she was the victim of unlawful gender based discrimination. In such circumstances, as here, the employee would not be accorded any forum whatever--in court, in grievance proceedings, or in arbitration--in which to seek redress for the alleged discrimination by the employer. The sole remedy available to petitioner under the Fourth Circuit's decision is an action against the union, if it violated its duty of fair representation.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW ABOUT WHICH THE COURTS OF APPEALS ARE DIVIDED AND WHICH THIS COURT PREVIOUSLY GRANTED CERTIORARI TO RESOLVE IN *WRIGHT V. UNIVERSAL MARITIME SERVICE CORP.*

Three years ago this Court granted certiorari in *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998), to decide whether a collective bargaining agreement can impose on employees subject to that agreement a legally enforceable obligation to seek arbitration rather than utilize civil actions to assert their rights under federal civil rights statutes. The Court did not resolve that question in *Wright*, concluding instead that the collective bargaining agreement at issue in that case did not in fact require the employee involved to arbitrate his discrimination claims. 525 U.S. at 79-82.

Certiorari was warranted in *Wright* because in 1998 there was a clear conflict among the circuits regarding the enforceability of collective bargaining agreements which purport to require employees to submit federal civil rights claims to arbitration. Only the Fourth Circuit had held that

such agreements were enforceable; several circuits had squarely rejected the legality of such bars to judicial relief for violations of federal anti-discrimination statutes. (Petition for Writ of Certiorari, No. 97-889, pp. 9-10). As the United States observed at the time,

> [e]very other court of appeals to have reached the issue since *Gilmer[v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)] has concluded that *Alexander [v. Gardner-Denver Co.*, 415 U.S. 36 (1974)] continues to preclude waiver in a collective bargaining agreement of an individual's substantive or procedural rights under federal anti-discrimination statutes.

(Brief for the United States, No. 97-889, p. 11)(citing cases in the Second, Sixth, Seventh, Eighth, Tenth and Eleventh circuits).

Today the Fourth Circuit remains the only court of appeals that will enforce against individual employee plaintiffs collective bargaining agreements that purport to require arbitration of such anti-discrimination claims; the number of courts of appeals which emphatically reject this view has grown. The importance of this issue has been substantially increased by this Court's recent decision in *Circuit City Stores, Inc. v. Adams*, — U.S. —, 121 S.Ct. 1302 (2001). *Circuit Cities* resolved the question that was unresolved at the time of *Wright* as to whether the Federal Arbitration Act is generally applicable to employment contracts. See *Wright*, 525 U.S. at 78 n. 1.

The minority rule followed by the Fourth Circuit stems from that court's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F. 3d 875 (4th Cir. 1995), *cert. denied* 519 U.S. 980 (1996). *Austin* insisted that a union could bargain away an employee's right to judicial enforcement of Title VII,

and could--in return for other concessions an employer might offer--require discrimination victims to take their complaints to arbitration. 78 F. 3d at 885. This Court had earlier held that employment discrimination victims cannot be required to utilize grievance procedures established by collective bargaining agreements. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). But *Austin* insisted that *Gardner-Denver* had been overturned by this Court's subsequent decision in *Gilmer v.Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which *Austin* concluded "rejects the principal concern in *Gardner-Denver*" about the such compulsory arbitration. 78 F. 3d at 880.

The Fourth Circuit relied on *Austin* to dismiss federal employment discrimination claims in *Wright v. Universal Maritime Service Corp.*, 121 F. 3d 702 (4th Cir 1997)(Americans With disabilities Act) and *Gingles v. Bethlehem Steel Corp.*, 145 F. 3d 1324 (table), 1998 WL 196606 (4th Cir.)(Title VII). Following this Court's decision in *Wright*, the Fourth Circuit reiterated its continued adherence to *Austin* in *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 331 (4th Cir. 1999)(Americans With Disabilities Act and Age Discrimination in Employment Act), and *Brown v. ABF Freight Systems, Inc.*, 183 F. 3d 319, 321 (4th Cir. 1999)(Americans With Disabilities Act). In the instant case the Fourth Circuit again applied the holding in *Austin*, emphasizing that it constituted "binding fourth Circuit case law" regarding the enforceability of collective bargaining agreements that make arbitration the exclusive remedy for violations of federal employment discrimination laws. (App. --a).

Most other courts of appeals have emphatically disapproved of the holding in *Austin*. The Second Circuit recently noted the overwhelming rejection of *Austin*:

> [M]ost lower courts have focused on the party negotiating the waiver of rights. When the

> arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies. The Second Circuit is no exception. *See Tran v. Tran*, 54 F. 3d 115, 117-18 (2d Cir. 1995)(. . . conclud[ing] that employer could not compel union employee to arbitrate federal statutory claims even though CBA required arbitration). Only the Fourth Circuit has concluded otherwise. *See Austin v. Owens-Brockway Glass Container, Inc.* . . . .

Rogers v. New York University, 220 F. 3d 73, 75 (2d Cir. 2000)(footnote omitted), cert. denied sub nom. *New York University v. Rogers*, 121 S.Ct. 626 (2000); *see* 220 F. 3d at 75 n. 1 (citing cases in the Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia circuits rejecting the *Austin* rule).

The Sixth Circuit has expressly rejected *Austin* both before and after this Court's decision in *Wright*. In *Penny v. United Parcel Service*, 128 F. 3d 408 (6th Cir. 1997), that court of appeals reversed a district court decision that had relied on *Austin*.

> We believe this case is controlled by *Gardner-Denver* rather than by *Gilmer*. . . . [T]he divided panel of the Fourth Circuit that decided *Austin* concluded that the "old law" of *Gardner-Denver* was no longer controlling. . . . *Austin* has not inspired many followers. . . . [D]ecisions [in the Second, Seventh, Eighth, Tenth and Eleventh Circuits rejecting *Austin*] display more fidelity to the Supreme Court's holdings in *Gardner-Denver* and *Gilmer* than does *Austin*. . . . [A]lthough *Gilmer* permits an *individual* to waive his prerogative to pursue a statutory right in a judicial forum, that case does

> not alter *Gardner-Denver's* holding that a labor union cannot make such a waiver prospectively on an individual's behalf.

128 F. 3d at 412-13 (Emphasis in original). Subsequent to this Court's decision in *Wright* the Sixth Circuit reiterated this position.

> *Penny* fully set forth the oft-repeated reasons why *Austin*'s analysis was unsound . . . . Even if we had not already decided *Penny*, we would reach the same conclusion because the Supreme Court's recent decision in *Wright* implicitly overruled *Austin* anyway.

Bratten v. SSI Services, Inc., 185 F. 3d 625, 630 (6th Cir. 1999).

In the Seventh Circuit Judge Posner pointedly noted the inter-circuit conflict about this issue.

> Both sides of these appeals . . . are able to cite a case or two that squarely support their position--cases that really do not differ in any material particular from the present one--but in doing so all they have done is identify a circuit split. Compare *Austin v. Owens-Brockway Glass Container, Inc.*, . . . with *Varner v. National Super Markets, Inc.*, 94 F. 3d 1209, 1213 (8th Cir. 1996).

Pryner v. Tractor Supply Co., 109 F. 3d 354, 363 (7th Cir. 1997), cert. denied sub nom. *Tractor Supply co. v. Pryner*, 522 U.S. 912 (1997). The Seventh Circuit stressed the need for a final resolution by this Court of the questions raised by these cases.

> On balance our case is closer to *Alexander*; but is enough left of *Alexander* to compel a

> decision in favor of plaintiff? Only the Supreme Court can answer that question; and we are timid about declaring decisions by the Supreme Court overruled when the Court has not said so.

109 F. 3d at 365. Absent further guidance from this Court, the Seventh Circuit held that "the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery." 109 F. 3d at 363 (Emphasis in original). More recently, the Seventh Circuit noted that decisions in the Second, Sixth, Eighth, Tenth and Eleventh circuits had reached the same conclusion.

> [M]ost circuits agree with the result in *Pryner*. [Citing cases] . . . Only the Fourth Circuit has held that a CBA arbitration clause can bar an individual worker's Title VII claim. See *Austin v. Owens-Brockway Glass Container, Inc.*, . . . We therefore see no need to reevaluate *Pryner*.

Johnson v. Bodine Electric Co., 142 F. 3d 363, 366-67 (7th Cir. 1998)(footnote omitted).

The Ninth Circuit has disagreed with *Austin* in particularly strong language:

> There is a . . . troubling case . . . that conflicts directly with *Gardner-Denver*. See Austin *v. Owens-Brockway Glass Container, Inc.* . . . . In that case . . . the Fourth Circuit in fact flatly rejected *Gardner-Denver*, which in our view circuit courts are not free to do. . . . The Fourth Circuit also ignored the reasoning of eight Justices on the subject of statutory analysis . . . and . . . decided to disregard the legislative history of the 1991 Civil Rights Act. . . . We

> respectfully conclude that the Fourth Circuit simply misconstrued controlling law.

Duffield v. Robertson Stephens & Co., 144 F. 3d 1182, 1192 (9th Cir.), cert. denied 525 U.S. 982 (1998). In subsequent opinions that circuit has emphasized that the rule in the Fourth Circuit conflicts with decisions in the Ninth and seven other circuits.

> Since the decision in *Gilmer*, other circuits, with only one exception, have held that an employee has the right to sue under the FLSA, as well as other statutes, without having to resort to the collectively bargained grievance-arbitration procedures. [Citing cases] . . . *But see Austin v. Owens-Brockway Glass Container, Inc.*.

Albertson's, Inc. v. United Food and Commercial Workers Union, 157 F. 3d 758, 761-62 (9th Cir. 1998), cert. denied 528 U.S. 809 (1999).

> The majority of our sister circuits have held that collective bargaining agreements do not waive an individual employee's right to sue for statutory discrimination claims. [Citing cases] . . . *But see Austin v. Owens-Brockway Glass Container, Inc.* . . . [I]n *Duffield v. Robertson, Stephens & Co.* . . . we rejected the Fourth Circuit's view.

Doyle v. Raley's Incorporated, 158 F. 3d 1012, 1015 n. 3 (9th Cir. 1998).

The Tenth, Eleventh and District of Columbia Circuits, recognizing the inter-circuit conflict, have also rejected the Fourth Circuit's position.

> Since *Gilmer*, employer/defendants have argued that *Gilmer* effectively overruled *Alexander* . . . . To date, only the Fourth Circuit has accepted this argument, *Austin v. Owens-Brockway Glass Container*, . . . while the majority view is that *Alexander* and its progeny "remain good law and that statutory employment claims are independent of a collective bargaining agreement's grievance and arbitration procedures." . . . [Citing cases] . . . [W]e adopt the majority view.

Harrison v. Eddy Potash, Inc., 112 F. 3d 1437, 1453-54 (10th Cir. 1997), cert. denied 524 U.S. 947 (1998).

> [T]his case is like *Alexander* and unlike *Gilmer*. It may be that the Supreme Court has cut *Alexander* back so far that it will not survive. Perhaps, but we are not convinced we are authorized to sing the dirge of *Alexander*. We will leave that to the Supreme Court . . . In applying *Alexander* instead of *Gilmer* to collective bargaining agreements, we follow the Seventh, Eighth, and Tenth Circuits. [Citing cases] . . . We disagree with the result and reasoning of the Fourth Circuit, which reached the opposite conclusion. *See Austin*.

Brisentine v. Stone & Webster Engineering Corp., 117 F. 3d 519, 525-26 (11th Cir. 1997).

> ALPA suggests that *Gilmer* "effectively supersedes" *Gardner-Denver* and permits a union to waive the employees' right to a judicial forum for statutory claims. The Fourth Circuit . . . agree[s], see *Austin v. Owens-Brockway*

> *Glass Container, Inc.*, . . . prematurely we think.
>
> . . . [W]e do not understand the Court in *Gilmer* to have overruled *Gardner-Denver*. . . . We see a clear rule of law emerging from *Gardner-Denver* and *Gilmer*: Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmer*, other than the Fourth, are in accord with this view. . . . [A] union may not use the employee's individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group.

Air Line Pilots Association, International v. Northwest Airlines, Inc., 199 F. 3d 477, 484 (D.C.Cir. 1999), *rehearing en banc granted* 199 F. 3d 477 (D.C.Cir. 1999), *judgment reinstated* 211 F. 3d 1312 (D.C.Cir. 2000), cert. denied 121 S.Ct. 565 (2000).[2]

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[2]The First Circuit has gone even further, reading *Wright* to have expressly rejected the holding in *Austin*. *Quint v. A.E. Staley Mfg. Co.*, 172 F. 3d 1, 9 (1st Cir. 1999).

Several state courts have noted the conflict between the Fourth circuit and most other circuits on this issue. E.g., *Arslanian v. Oakwood United Hospitals, Inc.*, 240 Mich. App. 540, 547, 618 N.W. 2d 380, 383 (Mich. Ct. App. 2000)("Those courts finding to the contrary of *Austin*, some explicitly rejecting its reasoning, are numerous. . . . We agree with this vast majority of courts"); *Torrez v. Consolidated Freightways Corp. of Delaware*, 58 Ca. App. 4th 1247, 1249-50, 68 Cal. Rptr. 792, 793-94 (6th Dist. 1997)("Since *Austin*, virtually every court that has considered the issue has disagreed. In lengthy analyses, these courts have explained that the *Austin* majority misinterpreted the United States Supreme Court precedents . . . . [W]e join the growing chorus of cases rejecting *Austin's*

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE TENSION BETWEEN *ALEXANDER V. GARDNER-DENVER* AND *GILMER V. INTERSTATE/JOHNSON LANE CORP.* AND TO CLARIFY THE MEANING OF *WRIGHT*

This division among the courts of appeals derives in part from the differing implications of the decisions of this Court. As this Court explained in Wright, whether a CBA can deny employees access to a federal judicial forum:

> [B]rings into question two lines of our case law. The first is represented by *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII . . . if "he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement." 415 U.S. at 49. . . . The second line of cases implicated here is represented by *Gilmer v. Interstate/Johnson Law Corp.* . . . . which held that a claim brought under the Age Discrimination in Employment Act . . . could be subject to compulsory arbitration. . . . There is obviously some tension between these two lines of cases.

Wright v. Universal Maritime Service Corp., 525 U.S. at 75-76. As Judge Posner noted in *Pryner* and the Eleventh Circuit recognized in *Brisentine*, only this Court can clarify the relationship between these two lines of cases.

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reasoning.")(Footnote omitted).

In addition, this case highlights an important ambiguity in the language of *Wright* itself. *Wright* holds that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." 525 U.S. at 80. But that decision characterizes in several quite different ways *what* must be "clear and unmistakable." *Id.*. In its broader formulation *Wright* insists that "any CBA requirement to arbitrate . . . must be particularly clear." 525 U.S. at 79. This formulation of the rule in *Wright* was assuredly not meant here. The language of the CBA in this case merely *permits*, but does not require, resort to arbitration. "Unresolved grievances arising under [the section incorporating Title VII] are the proper subjects for arbitration." (App. 4a). This provision cannot plausibly be said to require with unmistakable clarity, or indeed even arguably to require at all, arbitration of such grievances.

A footnote in *Wright*, on the other hand, suggested that the opinion required that "a CBA clearly encompasses employment-discrimination claims." 525 U.S. at 82 n. 2. The CBA in this case, although not requiring arbitration (explicitly or at all), does contain the express language--found lacking in *Wright*--incorporating into the CBA the commands of Title VII. The courts below read the unmistakable clarity rule in *Wright* to require only a specific and unambiguous commitment to compliance with Title VII. (App. 4a). This is the fourth time since 1999 that the Fourth Circuit has held that an express reference to a federal anti-discrimination statute is sufficient without more to satisfy the unmistakable clarity requirement of *Wright*.[3] Only this Court can definitively resolve this question about the meaning of *Wright*.

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[3]*Robinson v. Healthtex, Inc.*, 215 F. 3d 1321 (table), 2000 WL 691053 *3 (4th Cir. 2000); *Brown v. ABF Freight Sys., Inc.*, 183 F. 3d 319, 321 (4th Cir. 1999); *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 331 (4th Cir. 1999).

The questions raised by this case are of enduring importance. The volume of litigation in the lower courts about this problem amply attests to the large number of litigants whose rights and remedies turn on a resolution of the issue left unresolved in *Wright*.

More fundamentally, the differences that persist in the wake of *Wright* leave unions and employers uncertain as to the legal significance of the countless collective bargaining agreements negotiated each year. The union officials in *Wright* itself did not understand their CBA to preclude their members from resort to federal courts; to the contrary, the president of Local 1422 of the International Longshoreman's Association, AFL-CIO, although strongly objecting to the employer's actions, did not file a grievance, but instead advised Mr. Wright to file suit under the Americans With Disabilities Act.[4] In the instant case the union , rather than pursuing remedies available to it under the CBA, also advised petitioner to file suit under Title VII. It is inconceivable that union officials involved--unless proceeding in extraordinary bad faith--would have advised their members to file suit if they had understood the CBA in question to assure the failure of that tactic. In both cases the decision of the Fourth Circuit gave to the CBA a meaning that the parties to that CBA--or at least the union in question--never intended. The integrity of the collective bargaining process requires a definitive decision from this Court making clear to union negotiators (and members) whether, and if so when, the terms of a CBA will have the effect of stripping union members of their access to a federal judicial forum.

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[4]Brief for Petitioner, No. 97-889, pp. 3-4.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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United States Court of Appeals,

Fourth Circuit.

LORI A. SAFRIT, Plaintiff-Appellant,

v.

CONE MILLS CORPORATION, Defendant-Appellee.

No. 99-2677.

Argued Dec. 7, 2000.

Decided April 27, 2001.

ARGUED: Nancy Renee Gaines, Salisbury, NC, for Appellant. Donald Ross Hamilton, Jr., Haynsworth, Baldwin, Johnson & Greaves, L.L.C., Greensboro, NC, for Appellee. **ON BRIEF:** James M. Powell, Haynsworth, Baldwin, Johnson & Greaves, L.L.C., Greensboro, NC, for Appellee.

Before WILKINSON, Chief Judge, TRAXLER, Circuit Judge, and James C. CACHERIS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

The issue in this case is whether a plaintiff can proceed with a Title VII claim in federal court in the face of a Collective Bargaining Agreement which explicitly states that Title VII claims would be subject to binding arbitration. In accordance with our precedent and the Supreme Court's recent reaffirmation of the validity of arbitration for employment disputes, we affirm the judgment of the district court that plaintiff's claim is subject to arbitration.

I.

Lori Safrit was employed at Cone Mills' plant in Salisbury, North Carolina since 1982. She was a member of

the United Needletrades, Industrial, and Textile Employees Union (UNITE) during her employment. In November 1994, she became a fixer trainee. She was the only female fixer in her class. The defendant allegedly failed to train Safrit properly and denied her job opportunities available to other trainees.

The Collective Bargaining Agreement gave the union, not the employee, the exclusive option to proceed to arbitration. The CBA provided a four-step grievance procedure. If the complaint was still unresolved after the four steps, the CBA allowed for arbitration. Safrit could not proceed at any level without the union. The union took her case to the fourth step of the grievance process. At this point, Cone Mills agreed to correct the earlier deficiencies in the training program. This corrective measure caused the union to stop pursuing the grievance.

Cone Mills allegedly continued to discriminate against Safrit after the company reached the agreement with the union to correct the deficiencies in the training program. Safrit returned to the union to seek enforcement of the previous agreement and a remedy for the continuing discrimination. The union advised Safrit to seek legal counsel to pursue remedies outside the grievance process. The union did not file a second grievance. Safrit then filed a charge of discrimination with the EEOC. Subsequently, she filed the present complaint, alleging that Cone Mills violated Title VII by discriminating against her based on her sex. At the time the complaint was filed, Safrit was still employed at the plant. The plant has since closed.

Section XX of the CBA specifically stated that the company and the union "agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability.... The parties further agreed [sic] that they will abide by all the requirements of Title VII of

the Civil Rights Act of 1964." Section XX further noted, "Unresolved grievances arising under this Section are the proper subjects for arbitration." Cone Mills urged the district court to dismiss the case, arguing that the CBA clearly and unmistakably permitted arbitration as the sole remedy for alleged violations of Title VII.

II.

The district court granted summary judgment for Cone Mills. It stated that the Fourth Circuit allows a Collective Bargaining Agreement negotiated by a union on behalf of an employee to validly waive an employee's statutory rights to a federal forum. *See Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 321 (4th Cir.1999). The district court also noted that the Supreme Court does not preclude a waiver of the right to a federal forum in a collective bargaining agreement if it is done in "clear and unmistakable" language. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998).

The district court recognized that this court has previously held that a "clear and unmistakable" waiver can occur in two ways. First, the agreement can contain an explicit arbitration clause in which the parties agree to submit to arbitration all federal causes of action arising out of employment. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir.1999). Second, a general clause requiring arbitration under the agreement can be coupled with a provision which makes "unmistakably clear that the discrimination statutes at issue are part of the agreement...." *Id.*

Here, Section XX of the CBA indubitably provides such a clear and unmistakable waiver. Indeed, it is hard to imagine a waiver that would be more definite or absolute. The parties agreed that they would "abide by all the requirements of Title VII" and that "[u]nresolved grievances

arising under this Section are the proper subjects for arbitration."

Safrit now argues that her good-faith compliance with the grievance provisions of the governing CBA should preserve her right to pursue claims in a federal forum, especially when the grievance process was inadequate to remedy the discriminatory treatment and when she herself had no control over the further processing of the complaint. But Safrit runs flat against binding Fourth Circuit case law on this point. We have already held, post-*Wright*, that a collectively bargained agreement to arbitrate a statutory discrimination claim is enforceable. *See Brown*, 183 F.3d at 321; *Carson*, 175 F.3d at 331. And the Supreme Court itself has recently acknowledged the continuing viability of arbitration claims in the employment context. *See Circuit City Stores, Inc. v. Adams*, No. 99-1379, 69 U.S.L.W. 4195 (U.S. Mar. 21, 2001).

We are, of course, bound to apply our precedent on this point, and to respect the Supreme Court's most recent pronouncement on the subject of arbitration. An agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits. As Judge Widener wrote for the court in *Austin v. Owens-Brockway Glass Container, Inc.*, a "union has the right and duty to bargain for the terms and conditions of employment." *Austin*, 78 F.3d 875, 885 (4th Cir.1996). And since the right to arbitrate is a term or condition of employment, the union may bargain for this right as well. *See id.* (citing *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957)). The collective bargaining process permits unions to waive the right to strike "and other rights protected under the National Labor Relations Act." *Id.* (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983)). Indeed, no reason exists for distinguishing between "a union bargaining away the right to strike and a union bargaining for the right to arbitrate."

Austin, 78 F.3d at 885. In both cases, the union and its members decide that the price of giving up the right to strike or the right to litigate is worth the benefits that they will receive in return.

To redact one clause from the CBA would in effect alter the agreement reached during the often-difficult collective bargaining process. And there is no claim that Safrit's union failed to adequately represent its members during the course of negotiations with Cone Mills or during the grievance process.

III.

For the foregoing reasons, the judgment of the district court is *AFFIRMED*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH CAROLINA

Filed: Nov. 9, 1999

LORI A. SAFRIT,

Plaintiff,

v. 4:97CV00646

CONE MILLS,

Defendant.

MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Lori A. Safrit (Plaintiff) filed this suit alleging discrimination in violation of Title VII of the Civil Rights Act of 1964. The court was prepared to rule on Defendant's Motion to Dismiss but stayed the litigation pending a decision by the United States Supreme Court in *Wright v. Universal Maritime Serv. Corp.*, No. 96-2850 (4th Cir. July 29, 1997). The Supreme Court having ruled, this matter is again before the court on Defendant Cone Mills (Defendant) motion for summary judgment.[5] For the reasons stated herein, the court will grant Defendant's motion.

I. Facts

Plaintiff Lori A. Safrit is an employee at Defendant's Salisbury, North Carolina, plant. Plaintiff is a member of a

[5]Defendant filed a motion to dismiss. Based on Defendant's reliance on the Joint Affidavit attached to Defendant's Motion to Dismiss, the court has converted the motion into one for summary judgment.

union, UNITE, which negotiated a collective bargaining agreement (CBA) on her behalf with Defendant. The CBA provides a four-step grievance procedure to process any complaints and, if unresolved, a provision for arbitration. In Section XX of the CBA, Defendant agrees not to discriminate against any employee because of gender and to abide by Title VII of the Civil Rights Act of 1964. Section XX of the CBA requires that any grievance against Defendant for discrimination must be submitted to arbitration.

Plaintiff became a fixer trainee at Defendant's plant in Salisbury, North Carolina. Plaintiff alleges that she received insufficient training from Defendant as compared to the training of male employees. Plaintiff claims that comments were made to her about women trying to be fixers, and she was never offered a permanent position as fixer.

Plaintiff raised her complaints through the authorized grievance procedures provided by the CBA. Plaintiff's complaint proceeded through the fourth step of the grievance process, at which time Defendant agreed to provide Plaintiff additional time to train as a fixer. Plaintiff accepted Defendant's offer and did not pursue her grievance through arbitration.

Defendant wanted to move Plaintiff to a different shift to complete her training and fill a vacant fixer position. Plaintiff alleges that the discriminatory treatment continued. She did not continue in the fixer training program. After consultation with the union, Plaintiff sought relief under Title VII.

Defendant moved for summary judgment, arguing that the court has no jurisdiction to hear the case because Plaintiff's claim must be arbitrated as provided for by the CBA. Plaintiff claims she submitted her claim through the grievance procedures of the CBA, but the settlement she

reached with the Defendant failed. Plaintiff alleges that she was unsure about what steps to take once the discrimination continued. After consultation with the union, she sought relief in this court. Plaintiff argues that she should not be required to pursue arbitration when the grievance procedure has failed her.

II. Discussion

Summary judgment is appropriate in those cases where it is established through pleadings, affidavits, depositions, and other discovery documents that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2509-10 (1986). Thus, it is the burden of the moving party to show the court that no material factual issues exist for trial. The court must draw any permissible inference from the underlying facts as established in the record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57 (1986); *Pulliam Inv. Co. v. Cameo Prop.*, 810 F. 2d 1282, 1286 (4th Cir. 1987). "The court can determine that a trial is unnecessary only if either the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data Gen. Corp.*, 12 F. 3d 1310, 1315-16 (4th Cir. 1993).

The Fourth Circuit has held that a collective bargaining agreement negotiated by a union on behalf of an employee can validly waive an employee's statutory rights to a federal forum and subject those claims to arbitration. *Brown v. ABF Freight Sys., Inc.*, 183 F. 3d 319, 321 (4th Cir. 1999)(citations omitted). The United States Supreme Court has required that a waiver of the right to a federal forum in a collective bargaining agreement must be done in "clear and unmistakable" language. *Wright v. Universal Maritime Serv.*

Corp., 525 U.S. 70, __, 119 S.Ct. 391, 396 (1998). A "clear and unmistakable" waiver of an employee's statutory rights can occur in two ways. First, the agreement can contain an explicit arbitration clause in which the parties agree to submit any employment discrimination claim to arbitration. *Carson v. Giant Food, Inc.*, 175 F. 3d 325, 332 (4th Cir. 1999). Second, the agreement can have a provision which makes "unmistakably clear that the discrimination statutes at issue are part of the agreement . . . ." Id.

Section XX of the CBA negotiated between Plaintiff's union and Defendant clearly and unmistakably provides that any claim of gender discrimination is subject to arbitration. This satisfies both the first and second means of finding a valid waiver; therefore, Plaintiff's claim must be submitted to arbitration.

First, Plaintiff argues that she can bring this suit because the arbitration process failed when Defendant did not comply with the settlement. Any allegations of continued discrimination after the settlement would constitute new grievances Plaintiff had against Defendant. Under the clear terms of the CBA, Plaintiff's new grievances must follow the procedures set out in the CBA. Since Plaintiff did not initiate the grievance procedure for her new complaints, she cannot argue that the arbitration process has failed her.

Second, Plaintiff claims there was no clear law as to whether she had to proceed further with arbitration and time was running out for her to file a claim with the EEOC. At the time of the events Plaintiff complains of, the Supreme Court had decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991), which held that agreements to arbitrate statutory claims are enforceable.

Third, Plaintiff alleges that she sought the advice of her union, and the union told her to pursue her remedies through Title VII. She cites *Smith v. United Parcel Serv.*,

Inc., 947 F. Supp. 190 (D.Md. 1996) in support of her claim. *Smith* involved a union's breach of its duty of fair representation. *Id.* at 194

The Supreme Court has held that an employee can bring a civil action without first pursuing arbitration under a collective bargaining agreement when the employee's interests are not fairly represented by the union. *DelCostello v. Teamsters*, 462 U.S. 151, 164, 103 S.Ct. 2281, 2290-91 (1983). A union breaches its duty of fair representation when its conduct toward a member of the collective bargaining unit it "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916 (1967). Where the plaintiff alleges that a breach occurs but does not support it with a specific showing of a lack of good faith, the plaintiff has not proven a breach. *Brown v. Trans World Airlines*, 746 F. 2d 1354, 1359 (8th Cir. 1984).

Plaintiff did not allege in her pleadings or briefs that the union breached its duty or acted in an arbitrary or discriminatory manner toward her. In fact, Plaintiff stated that "[s]he went to her union and together they decided she should proceed to seek a remedy under Title VII rather than pursue further grievances." Pl.'s Resp. Def's Mot. Dismiss at 5. Even if Plaintiff alleged a breach of the union's duty, she has not set forth sufficient facts to establish a breach. Without allegations or facts establishing that the union acted arbitrarily or in bad faith, Plaintiff has not prove that the union breached its duty of fair representation.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 9th day of November 1999.

/S/ William L. Osteen

United States District Judge